No. 02-1080

FILED
JULY 7, 2003

IN THE

Supreme Court of the United States

General Dynamics Land Systems, Inc.,
Petitioner,

v.

DENNIS CLINE, *et-al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND THE INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO, AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

JONATHAN P. HIATT
JAMES B. COPPESS
815 Sixteenth Street, NW
Washington, DC 20006

DANIEL W. SHERRICK
MICHAEL F. SAGGAU
8000 East Jefferson Avenue
Detroit, MI 48214

LAURENCE GOLD *
805 Fifteenth Street, NW
Washington, DC 20005
(202) 842-2600

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION AND SUMMARY OF ARGUMENT	1
ARGUMENT	3
CONCLUSION	18

TABLE OF AUTHORITIES

CASES — Page

Public Employees Retirement System of Ohio v. Betts, 492 U.S. 158 (1989) 10

STATUTES AND REGULATIONS

Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.*:
- §1(b), 29 U.S.C. § 621(b) 3, 14
- § 4(a)(1), 29 U.S.C. § 623(a)(1) 4
- § 4(f)(2)(B)(i), 29 U.S.C. § 623(f)(2)(B)(i) .. *passim*
- § 11(l), 29 U.S.C. § 630(l) 12

Employee Retirement Income Security Act, 29 U.S.C. § 1001, *et seq.*:
- § 3(1), 29 U.S.C. § 1002(1) 6
- § 3(3), 29 U.S.C. § 1002(3) 6

Older Workers Benefit Protection Act of 1990. P.L. 101-433, 104 Stat. 978, 978-979 (1990) 10, 14
- § 101 10
- § 103 10

29 C.F.R. § 1625.2(b) 9
29 C.F.R. § 1625.10 ..... 7, 11
29 C.F.R. § 1625.10(a)(1) 8
29 C.F.R. § 1625.10(b) 6
29 C.F.R. § 1625.10(c) 8
29 C.F.R. § 1625.10(d) 8
29 C.F.R. § 1625.10(d)(2) 9
29 C.F.R. § 1625.10(f)(2)(iii) 9

MISCELLANEOUS

135 Cong. Rec. S9948-49 (1989) 11
136 Cong. Rec. S9444 (1990) 14
136 Cong. Rec. S13240 (1990) 12
136 Cong. Rec. S13241 (1990) 13
136 Cong. Rec. S13594 (1990) 14

TABLE OF AUTHORITIES—Continued

Page

136 Cong. Rec. S13598 (1990) 14
136 Cong. Rec. S13611 (1990) 14
136 Cong. Rec. H8738 (1990) 14
46 F.R. 47724 (Sept. 29, 1981) 9
H.R. 3200, 101st Cong., 1st Sess. (Aug. 3, 1989) .. 11
Jt. Hearings before the Select Committee on Aging and the Subcommittees on Employment Opportunities and Labor-Management Relations of the House Committee on Education and Labor, 101st Cong., 1st Sess. (Sept. 21, 1989) 13
Jt. Hearing before the Subcommittee on Labor of the Senate Committee on Labor and Human Resources and the Special Committee on Aging, 101st Cong., 1st Sess., Serial No. 101-308 (Sept. 27, 1989) 12, 13
S. 1511, 101st Cong., 1st Sess. (Aug. 3, 1989) 11, 12
Sen. Rep. No. 101-263 (1990) 13

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND THE INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO, AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") and the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO, ("UAW") file this brief *amici curiae* in support of petitioner with the consent of the parties as provided for in the Rules of this Court.[1] The AFL-CIO is a federation of 65 national and international labor organizations with a total membership of approximately 13 million working men and women. The UAW is the labor organization that negotiated the retiree health insurance plan challenged in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO ("UAW" or "the Union") is the collective bargaining representative for a three facility bargaining unit of employees of General Dynamics Land Systems, Inc. ("General Dynamics" or "the Company"). This case concerns the retiree health insurance plan established by the collective bargaining agreement covering that bargaining unit in effect from July 1997 until October 2001.

Under that plan, workers who were 50 years or older on July 1, 1997 and retired after that date were provided with

---

[1] No counsel for a party authored this brief *amici curiae* in whole or in part, and no person or entity, other than the *amici*, made a monetary contribution to the preparation or submission of this brief.

retiree health insurance, but workers who were younger than age 50 on July 1, 1997 and retired thereafter were not provided with such insurance.

The plaintiffs in this case have challenged this insurance plan under the Age Discrimination in Employment Act ("ADEA") on the grounds that the plan discriminated on the basis of age by providing retiree health insurance coverage for workers who were 50 or older but not for workers who were younger than 50.

The UAW and the AFL-CIO agree with the plaintiffs that all workers—and not just the oldest workers—are entitled to and should be provided with retiree health insurance by their employers. But no public law mandates such universal retiree health insurance and no labor relations law mandates that employers agree to provide such insurance in collective bargaining. That being so, it is our position that employers and labor organizations should be, and are, free—under the ADEA—to negotiate health insurance plans that favor older workers. And, it is our position that this reading of the ADEA protects the interests of all workers in this regard by giving necessary play to the collective bargaining process.

For these reasons, we agree with General Dynamics' position that the ADEA cannot be read to prevent employers and unions from negotiating agreements that provide better benefits to older workers than to younger workers. There are two statutory reasons for this:

- *First*, as the Company stresses in its brief, the ADEA cannot, in general, be read to create a cause of action for "reverse age discrimination," i.e., a cause of action on behalf of younger workers who claim that older workers have been treated better than them.

- *Second*, as we stress in this brief, Congress has addressed the precise issue of whether employee benefit plans may provide greater benefit payments to older workers than to younger workers in ADEA § 4(f)(2)(B)(i) and has expressly provided that employee benefit plans may prefer older workers in that way.

In the first point of our argument, we show that § 4(f)(2)(B)(i), read according to its plain terms, protects "any action" taken "to observe the terms of a bona fide employee benefit plan" where "the actual amount of [the benefit] payment made . . . on behalf of an older worker is *no less than* that made . . . on behalf of a younger worker." 29 U.S.C. § 623(f)(2)(B)(i) (emphasis added). And we further show that, by the plain meaning of the statutory language, a benefit plan that provides *greater* benefits to *older* workers than it does to younger workers is a plan protected by this section.

In the second point of our argument, we examine the legislative history of ADEA § 4(f)(2)(B)(i) and show that this reading of the statutory text according to its terms accurately reflects the intent of Congress in enacting that provision.

Finally, in the third point of our argument, we describe the circumstances surrounding the negotiation of the retiree health insurance provision at issue here to demonstrate concretely how ADEA § 4(f)(2)(B)(i) furthers the statutory purpose of "help[ing] employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.SC. § 621(b).

ARGUMENT

In this case, the plaintiffs—General Dynamics employees who were, at the relevant time, between the ages of 40 and 50—"claim that their employer illegally discriminated against them on the basis of their age" in violation of the Age Discrimination in Employment Act by complying with the terms of a collective bargained retiree health insurance plan that "facially discriminates on the basis of age by creating two classes of employees: employees over the age of fifty,

who are entitled to retiree health care benefits, and employees under the age of fifty, who are not." Pet. App. 23a.

The district court dismissed the complaint on the ground "that a claim of reverse age discrimination[, such as that advanced by the plaintiffs,] is not cognizable under ADEA." Pet. App. 24a. The court of appeals held, to the contrary, that, "[b]y the plain language of the ADEA"—§ 4(a) of which makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age," 29 U.S.C. § 623(a)(1)—the plaintiffs "are the victims of 'age discrimination,'" because "they were denied job benefits due to their age." *Id.* at 9a. The court of appeals majority acknowledged "that the facts of this case are unusual and fall outside the typical ADEA claim, in that the plaintiffs were younger than the employees who were to received health benefits upon retirement under the [plan]." *Id.* at 10a. But the court below concluded that it was "bound by the plain language of the statute" to reach the counterintuitive result it did, "[w]hatever the policy justifications for holding otherwise." *Id.* at 11a.

In this Court, General Dynamics focuses on the broad threshold issue of whether ADEA § 4(a) "provides a cause of action for employees within the protected class who claim that their employer discriminated against them on the basis of age because of the employer's more favorable treatment of older employees, also within the class." Pet. App. 2a. We agree with General Dynamics' position that ADEA § 4(a) does *not* create a cause of action against an employer for treating older workers more favorably than younger workers and with the Company's showing in support of that position.

Having said that, rather than address the threshold issue of whether the ADEA as a general matter makes "reverse age discrimination" unlawful, we address the narrower issue

raised by the plaintiffs' complaint in this case: whether the employer violated the ADEA by establishing a retiree health insurance plan that provides benefits to employees over the age of 50 and does not provide those benefits to similarly situated employees under that age. As we show, ADEA § 4(f)(2)(B)(i) grants express permission for an employer "to observe the terms of a bona fide employee benefit plan" where "the actual amount of [the benefit] payment made . . . on behalf of an older worker is *no less than* that made . . . on behalf of a younger worker." 29 U.S.C. § 623(f)(2)(B)(i) (emphasis added). That provision makes it plain that the employer action the plaintiffs complain of here does not constitute a violation of the ADEA.

1. Section 4(f)(2)(B)(i) provides in full:

> "It shall not be unlawful for an employer, employment agency, or labor organization—
>
> * * *
>
> "(2) to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this [Act]—
>
> * * *
>
> "(B) to observe the terms of a bona fide employee benefit plan—
>
> "(i) where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, as permissible under section 1625.10, title 29, Code of Federal Regulations (as in effect on June 22, 1989)." 29 U.S.C. § 623(f)(2)(B)(i).

Section 4(f)(2)(B)(i), thus establishes three conditions for treating as lawful actions taken pursuant to an employee benefit plan that would be "otherwise prohibited under [§ 4](a)." *First*, the action must be taken "to observe the

terms of a bona fide employee benefit plan." *Second*, "for each benefit or benefit package [under the plan], the actual amount of payment made or cost incurred on behalf of an older worker" must be "no less than that made or incurred on behalf of a younger worker." *Third*, the "benefit or benefit package" in question must be "permissible under section 1625.10, title 29, Code of Federal Regulations (as in effect on June 22, 1989)."

We now take up in turn each of the three § 4(f)(2)(B)(i) conditions and discuss their application to the General Dynamics retiree health insurance plan.

a. There is no question that the General Dynamics retiree health insurance plan is "a bona fide employee benefit plan" within the meaning of ADEA § 4(f)(2)(B)(i). "An 'employee benefit plan' is a plan, such as a retirement, pension, or *insurance plan*, which provides employees with what are frequently referred to as 'fringe benefits.'" 29 C.F.R. § 1625.10(b) (emphasis added). *See also* 29 U.S.C. § 1002(1) & (3) (defining the term "employee benefit plan" as used in ERISA to include health insurance plans). And, "[a] plan is considered 'bona fide' if its terms . . . have been accurately described in writing to all employees and if it actually provides the benefits in accordance with the terms of the plan." 29 C.F.R. § 1625.10(b). The General Dynamics plan meets these two criteria.

b. Nor is there any question that, under the General Dynamics insurance plan, "the actual amount of payment made . . . on behalf of an older worker is *no less than* that made . . . on behalf of a younger worker." 29 U.S.C. § 623(f)(2)(B)(i) (emphasis added). The plaintiffs' claim is precisely that the plan violates the ADEA because the retiree health insurance plan makes payments on behalf of an older worker that are *greater* than the payments made on behalf of a younger worker. But that is what § 4(f)(2)(B)(i), in terms, permits: where the older worker's payment is *more* than the

younger worker's, "the actual amount of payment made . . . on behalf of an older worker" is most certainly "no less than that made . . . on behalf of the younger worker."

It is significant in this regard that § 4(f)(2)(B)(i) does *not* require "equal" benefit payments on behalf of older and younger workers, except to the extent that lower payments to older workers can be justified by higher relative costs. Rather, the statute protects "any action" taken "to observe the terms of a bona fide employee benefit plan," just so long as *either* the benefit "payment" made on behalf of an older worker is "no less than" that made on behalf of a younger worker *or* the "cost incurred" in making the older worker's benefit payment is "no less than" the cost incurred in making the younger worker's benefit payment.

c. The remaining question is whether a plan providing greater health insurance benefits to older workers is "permissible under section 1625.10, title 29, Code of Federal Regulations (as in effect on June 22, 1989)." 29 U.S.C. § 623(f)(2)(B)(i). The answer to that question is "yes."

Section 1625.10, title 29, Code of Federal Regulations (as in effect on June 22, 1989)—which has remained unchanged since 1989—contains the EEOC's interpretation of ADEA § 4(f)(2) as in effect on that date, i.e., the immediate predecessor to the current § 4(f)(2)(B)(i). As set out in the EEOC's 1989 regulation, ADEA § 4(f)(2) provided that it was not unlawful for an employer

> "to observe the terms of . . . any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such . . . employee benefit plan shall require or permit the involuntary retirement of any individual specified by

section 12(a) of this Act because of the age of such individuals." 29 C.F.R. § 1625.10(a)(1).

The regulation "explain[s] three key elements of the [§ 4(f)(2)] exception:

> "(i) What a 'bona fide employee benefit plan' is;
>
> "(ii) what it means to 'observe the terms' of such a plan; and
>
> "(iii) what kind of plan, or plan provision, would be considered 'a subterfuge to evade the purposes of [the] Act.'" *Id.*

As we have previously shown, the General Dynamics insurance plan is, indeed, a "bona fide employee benefit plan" under the EEOC regulation. *See supra* p. 6.

It is equally plain that General Dynamics was "observ[ing] the terms" of the insurance plan, within the meaning of the EEOC regulation, in distinguishing between workers who were 50 or older on July 1, 1997 and those who were younger. The regulation defines "observ[ing] the terms" of a plan as taking "actions which are actually prescribed by the terms of a bona fide employee benefit plan." 29 C.F.R. § 1625.10(c).

And, it is beyond dispute that the General Dynamics retiree health insurance plan cannot be characterized as a "subterfuge to evade the purposes of th[e] Act" under the 1989 EEOC regulation's definition of a subterfuge. In this regard, the regulation provides that "a plan or plan provision which prescribes *lower benefits for older employees* on account of age is . . . a 'subterfuge' within the meaning of section 4(f)(2)," unless the employer can show "that the *lower level of benefits* is justified by age-related cost considerations." 29 C.F.R. § 1625.10(d) (emphasis added).[2] Under

[2] The EEOC regulation generally allows "cost comparisons and adjustments under section 4(f)(2) . . . [to] be made on a benefit-by-benefit basis or on a 'benefit package' basis, as described [in the regulations]." 29 C.F.R. § 1625.10(d)(2). However, "to justify reductions in health benefits," the regulation requires a "benefit-by-benefit approach" on the grounds that "[s]uch benefits appear to be of particular importance to older workers in meeting 'problems arising from the impact of age' and were of particular concern to Congress." 29 C.F.R. § 1625.10(f)(2)(iii), quoting 29 U.S.C. § 621(b).

the regulation, then, a plan can be characterized as "subterfuge" on the basis of differentials in benefit payments only if the plan "prescribes *lower* benefits for *older* employees on account of age." It follows ineluctably that an insurance plan that pays *higher* benefits to *older* workers cannot be so characterized and is "permissible" under the 1989 EEOC regulation.

All that being so, the action taken by General Dynamics in providing retiree health insurance coverage to certain older workers and not to certain similarly situated younger workers was taken pursuant to the Company's retiree health insurance plan and is lawful under § 4(f)(2)(B)(i).[3]

2. The legislative history of the 1990 amendments to the ADEA, adding § 4(f)(2)(B)(i) in its present form to the Act,

[3] As a general matter—and without regard to whether the action in question was taken pursuant to an "employee benefit plan"—the EEOC regulations allow preferences for older workers where the preference "will counteract problems related to age discrimination." 29 C.F.R. § 1625.2(b). The EEOC has explained that this exception is intended to "provide for a continuation of the flexible approach first announced in administrative Opinion Letters of the Department of Labor" approving contract provisions that, variously, "require that a certain number of positions be made available to an older segment of the protected age group" and provide "varying amounts of severance pay based, in part, on an employee's age." 46 F.R. 47724 (Sept. 29, 1981). The age distinction drawn by the collective bargaining agreement here is essentially similar to the age distinctions approved by these Department of Labor Opinion Letters. Thus, the Company's retiree health insurance plan passes ADEA muster by reason of the § 1625.2(b) regulation as well as by reason of ADEA § 4(f)(2)(B)(i).

strongly confirms that its statutory language was intended to mean what the words so clearly say.

Section 4(f)(2)(B)(i) as presently written was added to the ADEA by the Older Workers Benefit Protection Act of 1990. P.L. 101-433, § 103, 104 Stat. 978, 978-979 (1990). The 1990 ADEA amendments were enacted to overrule this Court's decision in *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158 (1989), and to thereby clarify the "congressional intent . . . to prohibit discrimination against older workers in all employee benefits except when age-based reductions in employee benefit plans are justified by significant cost considerations." P.L. 101-433, § 101, 104 Stat. at 978.

a. In *Betts*, this Court rejected the definition of the "'subterfuge' exception to the § 4(f)(2) exemption" contained in § 1625.10 of the EEOC regulations. 492 U.S. at 172. The Court explained its rejection of the regulation's definition of "subterfuge," by observing that "[t]he term . . . includes a subjective element that the regulation's objective cost-justification requirement fails to acknowledge." *Id.* at 171.[4]

Having rejected the EEOC's definition of "subterfuge," the *Betts* Court went on to hold that a "plan cannot be a subterfuge to evade the ADEA's purpose of banning arbitrary age discrimination unless it discriminates in a manner forbidden by the substantive provisions of the Act," i.e., unless the plan discriminates in some way *other* than in the provision of benefits. 492 U.S. at 176. On this basis, the Court concluded that § 4(f)(2) "exempt[s] the provisions of a bona fide benefit plan from the purview of the ADEA so long

[4] The *Betts* Court did accept, however, the definition of "employee benefit plan" contained in 29 C.F.R. § 1625.10(b). 492 U.S. at 174. In this regard, the Court noted that "[t]he statute's use of the phrase '*any* employee benefit plan' seems to imply a broad scope for the statutory exemption." *Id.* at 173 (emphasis in original).

as the plan is not a method of discriminating in other, non-fringe-benefit aspects of the employment relationship." *Id.* at 177.

b. On August 3, 1989—six weeks after the *Betts* decision—S. 1511 was introduced in the Senate for the express purpose of overruling *Betts* and reestablishing the rule contained in § 1625.10 of the EEOC regulations. 135 Cong. Rec. S9948-49 (1989). An identical bill was introduced on the same day in the House by Representative Hawkins. H.R. 3200, 101st Cong., 1st Sess. (Aug. 3, 1989). S. 1511 was the bill that Congress eventually enacted in the fall of 1990.

Insofar as is pertinent here, S. 1511 addressed the *Betts* decision in two steps. First, the bill defined the ADEA term "compensation, terms, conditions, or privileges of employment" to "encompass[] all employee benefits, including such benefits provided pursuant to a bona fide employee benefit plan." S. 1511, 101st Cong., 1st Sess. § 3 (Aug. 3, 1989). Second, the bill replaced § 4(f)(2) of the ADEA, as amended in 1978, with a new version of that section that included a subsection (B) specifying that it was not unlawful

> "to observe the terms of a bona fide employee benefit plan where, for each benefit or benefit package (as permissible under section 1625.10, title 29, Code of Federal Regulations, as in effect on June 22, 1989), the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such employee benefit plan shall require or permit the involuntary retirement of any

individual specified by section 12(a) of this Act because of the age of such individual." *Id.* § 4.

Both of these S. 1511 provisions remained virtually unchanged from the time S. 1511 was introduced until the time the bill was enacted into law. *See* 29 U.S.C. §§ 623(f)(2)(B)(i) & 630(l).

S. 1511 was drafted with the assistance of the EEOC. *See* 136 Cong Rec. S13240 (1990). At the Senate hearings on this bill, the representatives of the EEOC made clear that the amendments adding § 4(f)(2)(B) to the ADEA would permit an employer to provide *older* workers with *greater* benefits than the employer provides to *younger* workers.

The EEOC General Counsel stated, in so many words, that the bill would "permit[] an older employee to receive greater benefits or an employer to incur greater costs for an older than for a younger employee." Jt. Hearing before the Subcommittee on Labor of the Senate Committee on Labor and Human Resources and the Special Committee on Aging, 101st Cong., 1st Sess., Serial No. 101-308, p. 62 (Sept. 27, 1989) ("Senate Hearings"). *See id.* at 67. Indeed, one of the reasons given by the EEOC for preferring S. 1511 over another pending bill designed to overrule *Betts* was precisely that

> "S. 1511 precludes a claim for benefits discrimination by a younger protected age group worker by making it clear that, where benefits are concerned, the ADEA allows an employer to extend additional benefits to older workers that are not extended to younger workers also protected by the ADEA." *Id.* at 431.

In other words, the EEOC advocated the enactment of S. 1511 in part because it would preclude the precise claim advanced by the plaintiffs in this case.[5]

---

[5] The testimony of the EEOC representatives appearing before the House Committees considering H.R. 3200 was to the same effect. *See* Jt. Hearings before the Select Committee on Aging and the Subcommittees on Employment Opportunities and Labor-Management Relations of the House Committee on Education and Labor, 101st Cong., 1st Sess. pp. 59, 64, 70, 77, 222 & 224 (Sept. 21, 1989).

The sponsors of S. 1511 made the same point as the EEOC representatives regarding the effect of this aspect of the bill. Thus, Senator Metzenbaum began the hearings on S. 1511 by explaining that under the bill, "[a]n employer must provide older workers with benefits *at least equal to* those provided for younger workers unless the employer can prove that the cost of providing an equal benefit is greater for an older worker than for a younger one." Senate Hearings 2 (emphasis added). *See id.* 3.

The Senate Report on S. 1511 explained:

> "The language of the bill requiring that the 'payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker' is designed to provide employers with the flexibility of incurring *greater* costs for benefits on behalf of older workers in appropriate circumstances." Sen. Rep. No. 101-263 p. 18 (1990) (emphasis in original).

And, a summary of the bill placed in the Congressional Record by the sponsors on the day the Senate took up S.1511 similarly explained that under the bill, "[a]n employer must provide older workers with benefits at least equal to those provided for younger workers, unless the employer can prove that the cost of providing an equal benefit is greater for an older worker than for a younger one." 136 Cong. Rec. S13241.

The proposition that"[a]n employer must provide older workers with benefits *at least equal* to those provided for younger workers," 136 Cong. Rec. S13241 (emphasis added), unless the employer could provide a cost justification for

providing the older employer with lower benefits, was not at all controversial. Thus, the portion of S. 1511 that amended ADEA § 4(f)(2) to add the present subsection (B)(i) was passed by the Senate without any change to the bill reported by the Senate Labor Committee.

There was, however, some disagreement in the Senate over whether S. 1511, as reported by the Senate Committee, provided employers with sufficient flexibility to provide for age-based early retirement incentives and for age-based integration of benefits. *See* 136 Cong. Rec. S9444 (Sen. Hatch). This disagreement was resolved by a compromise amendment to S.1511 agreed to by Senators Hatch and Metzenbaum. *Id.* at S13594 (Amendment No. 2759). The compromise amendment provided employers with somewhat greater flexibility to offer age-based early retirement incentives and to integrate benefit packages using age-based criteria. *Id.* at S13598. The amendment did not change the portion of S.1511 adding subsection (B)(i) to ADEA § 4(f)(2). *Id.* at S13594.

As amended by the Hatch/Metzenbaum compromise, S. 1511 passed the Senate on September 24, 1990 by a vote of 94 to 1. 136 Cong. Rec. S13611. The House took up the bill on October 2, and, after a brief debate on that date, passed S. 1511 without amendment on October 3 by a vote of 406 to 17. *Id.* at H8738. The bill was then signed into law by the President on October 16. Public Law No: 101-433.

3. It is very much to the point that ADEA § 4(f)(2)(B)(i) and the protections it provides in crafting employee benefit plans is one of Congress' means for furthering the statutory purpose of "help[ing] employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. § 621(b). The events leading to the consummation of the collective bargaining agreement provision at issue in this case demonstrate as much.

The instant case arises out of a long running dispute between the UAW and General Dynamics over who should bear the costs of health insurance for both active and retired workers at the Company's three defense production facilities. Up until 1994, the UAW agreements with General Dynamics covering these facilities provided full health insurance coverage for both active employees and retirees. These health insurance provisions were carried over from the Union's agreements with Chrysler Corporation, which had owned these facilities prior to their acquisition by General Dynamics in 1982.

Shortly after acquiring the three facilities, General Dynamics began demanding concessions from the UAW with respect to health insurance coverage. The Company's principal argument was that its competitors in the defense industry were not providing comparable coverage for their employees and that the resulting difference in labor costs put General Dynamics at a disadvantage in bidding on defense work.

The Union successfully resisted General Dynamics' demands for health insurance concessions until 1994. In the negotiations for the 1994-97 agreement, the Company demanded that the health insurance plan cover only 80% of approved medical expenses and that health insurance for future retirees be ended entirely. The Company had implemented similar measures with respect to non-union employees in 1993. Health care cost was the principal area of disagreement between the UAW and General Dynamics during the 1994 negotiations, and the workers endured an eight week strike, rather than accede to the Company's demands. In the end, the Union was successful in maintaining health insurance coverage for future retirees, and the Union and the Company agreed on a provision for a 10% co-pay on medical claims for active employees and for future retirees.

The issue of health care cost was again at the center of the negotiations for the 1997 collective bargaining agreement. General Dynamics demanded a 20% co-pay on medical claims for active employees and present retirees and the elimination of health insurance for future retirees.

In the 1997 round of negotiations, the Company's ability to achieve health insurance cuts was strengthened by the recession in the defense industry. And, the Union's ability to resist the Company's demands in this regard was correspondingly weakened. One measure of how the Union's bargaining strength had been sapped is that the number of workers then employed in the UAW bargaining unit at the three facilities had declined to 500 workers from the 7,500 workers that were employed when General Dynamics acquired the facilities in 1982. In those circumstances, the Union concluded that it could not replicate its successful 1994 strike that had saved health insurance for all future retirees.

What the Union was able to work out with the Company, however, was a compromise that saved retiree health insurance for a substantial portion of the workforce. The Union did so by negotiating the provision—challenged in this lawsuit—that continued such insurance for future retirees who were at least 50 years old on July 1, 1997, the effective date of the new agreement. The older workers protected by this provision constituted forty percent of the active workforce at that time.

In the Union's view, protecting the expectations of the older workers was a first priority, because the UAW/General Dynamics agreement provides for retirement after 30 years of service and these older workers were, therefore, the ones most likely to be eligible for early retirement in the near future.[6] For a variety of reasons, including the applicable state

[6] Early retirement is also available to workers who are 60 years old and have at least ten years of service. Workers who are laid off for at least 60 days and who are at least 50 years old can, during their period of lay off, elect to take early retirement at age 55, if they have ten years of service. The normal retirement age under the General Dynamics pension plan is 65.

labor laws and the Vietnam era military draft, as of 1997 few workers would be able to meet the thirty year service requirement before age 50.

Whether the right to early retirement is real depends, in large part, on the availability of retiree health insurance coverage. In 1997, a retiree with thirty years of service at General Dynamics could retire with a monthly pension payment of approximately $2000. The monthly premium for health insurance comparable to that provided by the General Dynamics plan was, at that time, approximately $700. Thus, elimination of retiree health insurance coverage would reduce the expected disposable income of a General Dynamics retiree by more than one-third. The loss of that much expected income would obviously cause a significant number of older workers, who had been planning to take advantage of the early retirement option, to abandon that plan and remain in active employment.

The effects of such a change in plans by older workers go beyond their disappointment at not being able to retire at the time they had expected. Lay-offs under the UAW/General Dynamics agreement are by seniority. And in a recessionary economy, the decision of an older worker to forego early retirement directly threatens the employment security of younger bargaining unit workers. Thus, by protecting the retirement expectations of the older bargaining unit workers, the Union was also protecting the employment security of the younger workers.

On the plaintiffs' view of the ADEA, the bargaining between the UAW and General Dynamics would have been restricted to the all or nothing proposition that either all future

retirees would receive health insurance or none would. In the circumstances of the 1997 negotiations, the result could well have been that health insurance for future retirees would have been eliminated entirely. In this context, ADEA § 4(f)(2)(B)(i) enabled the parties to reach a compromise that provided health insurance coverage to the older group of workers whose close proximity to retirement made them most in need of such coverage and whose settled retirement expectations were most likely to be seriously upset by the precipitous elimination of such coverage. It is plain beyond dispute that allowing employers and unions to negotiate such compromises that protect older workers accords well with the purposes of the ADEA.

CONCLUSION

The decision of the court of appeals should be reversed and the judgment of the district court dismissing the complaint should be reinstated.

Respectfully submitted,

JONATHAN P. HIATT
JAMES B. COPPESS
815 Sixteenth Street, NW
Washington, DC 20006

DANIEL W. SHERRICK
MICHAEL F. SAGGAU
8000 East Jefferson Avenue
Detroit, MI 48214

LAURENCE GOLD *
805 Fifteenth Street, NW
Washington, DC 20005
(202) 842-2600

* Counsel of Record